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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROMAN FRENKEL et al.,

Plaintiff, Respondents, and
Cross-Appellants

v.

L.A. MICRO GROUP, INC., et al.,

Defendants, Appellants,
and Cross-Respondents.

B282664 (consolidated with
B283542)

(Los Angeles County
Super. Ct. Nos. BC434040,
BC434901)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven J. Kleifield, Judge. Affirmed.

Michelman & Robinson and Jeffrey D. Farrow for Appellants and Cross-Respondents L.A. Micro Group, Inc. and Arkadiy Lyampert.

Doll Amir & Eley, Michael M. Amir, and Amy I. Borlund for Respondent and Cross-Appellant Roman Frenkel.

Tantalo & Adler and Michael S. Adler, for Respondent Design Creator, Inc. and Cross-Appellants Design Creator, Inc., IT Creations, Inc., Medhi Ghazi Tabatabaei, Alex Gorban, Boris Pochtar, and Gal Gregori Lis.

Roman Frenkel and Arkadiy Lyampert jointly owned L.A. Micro Group, Inc. (LA Micro), a computer parts distributor. Disputes between the two men led Frenkel and some of LA Micro's other employees to leave and start a competing business called IT Creations, Inc. (ITC). A profusion of lawsuits followed. Frenkel requested dissolution of LA Micro and an accounting, and brought claims against Lyampert for breach of fiduciary duty, conversion of corporate assets, fraud, and unjust enrichment. LA Micro and Lyampert cross-complained against Frenkel, his new company ITC, and the other individuals who left LA Micro to work at ITC, asserting breach of fiduciary duty, misappropriation of trade secrets, unfair competition, and other claims. A vendor of LA Micro, Design Creator, Inc. (DCI), which was controlled by one of the people that left LA Micro for ITC, sued LA Micro, Lyampert, and Frenkel for breach of contract based on an alleged failure to pay for services rendered.

Following a multi-phase bench trial, the court dissolved LA Micro, and ordered Lyampert to pay Frenkel \$2,042,376.67 and DCI \$221,000. The court rejected Lyampert's cross-claims against Frenkel and others. The court also rejected a claim for attorney fees by ITC and its employees, which asserted Lyampert brought the misappropriation of trade secrets cause of action against them in bad faith.

Lyampert now appeals, contending the trial court erred on numerous grounds in ordering him to pay Frenkel and DCI. DCI and Frenkel cross-appeal, claiming their recoveries were insufficient (including a claim by Frenkel that the trial court should have awarded him punitive damages). Frenkel additionally requests this court take evidence and make findings regarding the ownership of an overseas entity, L.A. Micro Group UK, Ltd. (LAMUK), or in the alternative find the trial court erred in denying Frenkel leave to amend to assert claims related to LAMUK. ITC and various of its employees cross-appeal, claiming the denial of their request for attorneys' fees was error.

We conclude the judgment is supported by substantial evidence, and the parties' various contentions on appeal concerning it are without merit. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parties to this appeal present to us, as they did below, starkly different views of the underlying facts. In beginning its statement of decision, the trial court noted it "was reminded of the plight of the trial judge in *Corrales v. Corrales* (2011) 198 Cal.App.4th 221, 224: [¶] 'The trial judge in this case had a truly unenviable task before him as he pondered his decision. He found none of the key witnesses credible and had virtually no independent corroboration on which to rely. He was confronted with [business] books and records kept, not by GAAP (generally accepted accounting principles), but by "winging it." He probably developed severe neck pain from constantly shaking his head over the way the participants ran their business.' " Our role as a reviewing court is not to reweigh the evidence or assess witness credibility, tasks on which the trial court expended considerable

energy and thought. Rather, we start from the presumption the judgment below was correct. (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 981 (*Thompson*).) We summarize the facts in the light most favorable to the prevailing parties below, drawing all reasonable inferences in support of the judgment. (*Ibid.*)

A. Formation of LA Micro

In 2001, Lyampert formed LA Micro, a corporation that traded in computers and computer components. Before the end of the year, Lyampert asked Frenkel (with whom he had earlier operated a similar business) to join LA Micro. Lyampert and Frenkel were LA Micro's only shareholders, and for a time its only two employees. Each man owned 50 percent of the company. Lyampert was a director and president. Frenkel was a director and chief financial officer (CFO).

In 2002 or 2003, LA Micro hired Alex Gorban to create a website for it. After finishing the project, Gorban stayed on at LA Micro to work in sales. Gorban eventually became the head of sales and purchasing, supervising other employees. Gorban provided services to LA Micro through his own company DCI.

B. Misappropriation of Corporate Funds for Personal Use

In 2007 or 2008, Lyampert began taking substantial amounts of money out of LA Micro, which at one point left it without sufficient funds to purchase product, pay vendors, or pay employees. Lyampert used the withdrawn funds to purchase vehicles he was exporting to Russia, to pay his daughter's college tuition, to pay his mortgage and property taxes, and to finance travel unrelated to LA Micro. In addition, at Lyampert's direction, at least one LA Micro employee spent significant time

on Lyampert's personal matters. Frenkel spoke with Lyampert about these expenditures; Frenkel testified that in response, Lyampert would stop for a while before resuming. Both owners fought over LA Micro's finances, and there were multiple times the company had to scramble to pay its bills.

The improper use of corporate funds for personal expenses was not confined to Lyampert. Frenkel also used company money to pay for personal expenses, including building a balcony on his home. Frenkel nevertheless believed Lyampert's withdrawals were greater than his, and were putting LA Micro in a position where it was having difficulty meeting its obligations. Frenkel testified that at one point, Lyampert's withdrawals from the company exceeded his by \$400,000 to \$500,000.

In an August 14, 2009 letter, Frenkel explained to Lyampert the legal distinction between a corporation and its owners. Frenkel detailed some of the negative legal and tax consequences of treating corporate assets as personal assets, and told Lyampert that he was losing sleep over Lyampert's treatment of these matters. Frenkel informed Lyampert that as CFO, Frenkel intended to follow the law and treat Lyampert's personal expenses as capital draws from the corporation. Frenkel said if this was unacceptable, he and Lyampert would need to find an amicable way to end their business relationship.

C. Frenkel Leaves LA Micro and Seeks to Dissolve It

On February 8, 2010, Frenkel came to LA Micro's office with his lawyer. Frenkel told Gorban that he was going to present a letter to Lyampert dissolving LA Micro. At Frenkel's direction, Gorban gathered the staff to explain what was going

on. Gorban told the employees to leave work for the day, and the owners of the company would let them know what was going to happen next.

When Lyampert arrived later that morning, Frenkel's lawyer delivered the dissolution letter, advising Lyampert that Frenkel had decided to wind up and dissolve LA Micro effective immediately. Frenkel told Lyampert that further communications should be through their lawyers. That evening, Gorban communicated to Lyampert that Frenkel would agree to return to LA Micro and continue running the company, but only if Lyampert would agree to surrender all control, stay away, and reduce his ownership share to 20 percent. Lyampert declined the offer.

After February 8, 2010, Frenkel no longer performed any services as a director or officer of LA Micro. He did not attend board meetings, write checks, or monitor purchases and sales. Frenkel was no longer responsible for LA Micro's finances. After Frenkel had closed the company's Wells Fargo and Diners Club credit cards, Lyampert reopened them in Lyampert's name. Lyampert removed Frenkel from any LA Micro bank accounts.

D. Frenkel and Others Form a Competing Business

A day after leaving LA Micro, Frenkel began working with Gorban to form a new company called ITC, which went into the same line of business as LA Micro. Four LA Micro employees left to join ITC. By February 12, 2010, Frenkel and the others had leased new office space, and ITC was in business by the end of the month. Although Frenkel helped secure the lease and lines of

credit for ITC, and loaned the company money, he was not a listed owner or a director of ITC.

E. Lyampert Hires Michael Lev to Help Run LA Micro

In February 2010, Lyampert hired Mike Lev to help him run LA Micro. Both men were involved in operating LA Micro thereafter, as well as in LA Micro's later wind up.

F. Lyampert and Frenkel Discuss a Buy-Out of Frenkel's LA Micro Interest

Lyampert sought to prevent dissolution by purchasing Frenkel's LA Micro shares pursuant to Corporations Code section 2000, subdivision (d), which permits a party to halt a corporate wind up and dissolution by purchasing the shares of the party requesting dissolution. Lyampert asked Frenkel for a price at which Frenkel would be willing to sell. Frenkel replied that he would sell his shares to Lyampert for \$1 million, or if that was not agreeable, Frenkel would buy Lyampert's shares for that same price.

On March 3, 2010, Lyampert indicated he was unwilling to pay anything for Frenkel's shares. Lyampert alleged Frenkel's departure and his activities in forming ITC made Frenkel liable for damages that erased any value Frenkel's shares might have.

G. Litigation Commences

On March 18, 2010, Frenkel filed a complaint against LA Micro and Lyampert, seeking the dissolution of LA Micro and an accounting. Frenkel also alleged claims for breach of fiduciary duty, conversion of corporate assets, fraud, constructive fraud, and unjust enrichment.

On April 1, 2010, DCI filed a complaint against LA Micro, Lyampert, and Frenkel seeking damages for breach of oral contract based on an alleged failure to pay DCI for services DCI/Gorban rendered to LA Micro. That complaint was consolidated with the existing Frenkel complaint against LA Micro and Lyampert.

On April 19, 2010, LA Micro and Lyampert cross-complained against Frenkel, ITC, Gorban, and the other individuals who left LA Micro to work at ITC for breach of fiduciary duty, misappropriation of trade secrets, interference with contractual relations, unfair competition, commercial defamation, declaratory relief, breach of written agreement, unjust enrichment, accounting, and conversion.

H. Frenkel Moves to File a First Amended Complaint

On August 11, 2011, Frenkel sought permission to file a first amended complaint alleging Frenkel and Lyampert had ownership interests in LAMUK. The proposed additions in the first amended complaint asserted Lyampert owed Frenkel a fiduciary duty with respect to their shareholder interests in LAMUK, and that Lyampert breached his fiduciary duty by excluding Frenkel from his interest in LAMUK. The proposed first amended complaint further alleged Lyampert was an “involuntary trustee” holding LAMUK in constructive trust, and requested declaratory relief to determine the respective ownership interests of Frenkel and Lyampert in LAMUK, and their rights and duties with regard to that entity.

On September 2, 2011, the court denied Frenkel leave to amend. The court found Frenkel had not satisfactorily explained

when he discovered facts concerning LAMUK, and why the request for amendment was not made earlier. The court found amendment “at this late stage would almost certainly cause a continuance of the trial date [trial at that point was scheduled to begin in December 2011], would trigger a round of attacks on the amended complaint, and would add to the expense of this litigation, which would prejudice defendants.” The court further found the dispute over LAMUK concerned an entity separate from LA Micro, and thus did not relate to the same general set of facts set forth in the original complaint.

Frenkel thereafter pursued a legal claim in the United Kingdom regarding the ownership of LAMUK. A judgment in that case was eventually issued on September 13, 2017.

I. Pretrial LA Micro Dissolution Proceedings

The court granted Lyampert’s pretrial motion to stay the dissolution of LA Micro and to fix a fair value for the corporation. On October 13, 2011, pursuant to Corporations Code section 2000, subdivision (c), the court confirmed an appraisal valuing the company at \$10 million, and gave Lyampert 45 days to either pay Frenkel for his shares, or have LA Micro wound up and dissolved. Lyampert chose not pay \$5 million for Frenkel’s half of the company, and the court ordered LA Micro dissolved. LA Micro ceased business operations in November 2012.

J. The Neutral Accountant

Based on the parties’ belief that a third party accounting would resolve a majority of the damages claims and reduce trial testimony, the parties stipulated in April 2013 to retain a third party certified public accountant, fraud examiner, and financial forensics expert (the Neutral Accountant) to conduct an

accounting of the business affairs of LA Micro from February 8, 2010 through April 17, 2013.¹ The Neutral Accountant was to “[i]dentify, research, and report on transactions that appear to be outside of the ordinary course of business operations, personal expenses, inappropriate business expenses, unusual items, distributions and/or dividends to members or insiders, inconsistent benefits between members, transfers of assets or interests, loans to and from the company, and member/insider compensation.”

The parties stipulated, and the court ordered, that the Neutral Accountant was first to prepare a preliminary report, after which the parties would have the opportunity to object to the draft findings and conclusions, and to submit any additional information they believed the Accountant should consider. After considering that additional evidence, the parties agreed the Neutral Accountant would prepare a final report that would be admitted into evidence at trial, over any hearsay and foundation objections, subject to cross-examination and other legal objections to the findings. The parties agreed to request the court confirm and adopt the Neutral Accountant’s findings and conclusions. The parties further stipulated to be bound by those conclusions, subject to the above rights to provide supplemental information and question the Accountant before final conclusions were reached. The parties further agreed the Neutral Accountant would respond to any requests by the court for additional updates or information following the final report.

¹ The Neutral Accountant did perform some limited work for the pre-February 8, 2010 time period, for example to examine the reliability of LA Micro’s accounting system of record as of that date.

The Neutral Accountant issued his draft report on October 28, 2013, after which the parties objected to various preliminary conclusions. These objections led the Neutral Accountant to develop additional work product, revise existing work product, conduct additional interviews, request supplementary documentation, and revise or otherwise amplify his preliminary findings to address issues identified by the parties.

The Neutral Accountant submitted his final report on January 24, 2014. He reported on eleven disputed categories: adjusting journal entries; sources and uses of cash; ATM and cash withdrawals; personal credit card usage; inventory issues; PayPal transactions; professional fees; car payments; personal loans to LA Micro; Mike Lev's compensation and loan; and dividend account. For each category, the Neutral Accountant determined based on the available financial evidence whether questioned transactions were related to LA Micro's business. When the Accountant did not have adequate information to determine whether transactions were or were not LA Micro business expenses, he described the category as "inconclusive."

The court then held an initial phase of the bench trial, which involved testimony only from the Neutral Accountant, and included the parties cross-examining the Neutral Accountant on his findings. After this first phase, the court asked the Neutral Accountant to review the documents already in his possession and revisit his conclusions on six categories where the Accountant indicated further work might be warranted. At the court's request, the Neutral Accountant submitted a supplemental report dated January 29, 2015. Following the conclusion of this first phase, the court held a second phase of trial to receive evidence on all other issues.

K. The Statement of Decision

1. *Repayment Owed by Lyampert to LA Micro*

The trial court's statement of decision was filed January 11, 2017.² The trial court found Lyampert owed \$4,744,269.43 in repayment to LA Micro. That amount included personal expenses for Lyampert totaling \$811,252.97, which encompassed among other things personal credit card charges, frequent flier miles, and professional fees. Lyampert was also ordered to repay expenses the Neutral Accountant was unable to classify as either business or personal (the "inconclusive" category), based on the court's conclusion that Lyampert had exclusive control of LA Micro after Frenkel's departure, owed Frenkel a fiduciary duty to account for funds received into and expended by LA Micro after Frenkel's departure, and was therefore responsible if LA Micro's records were too inconclusive to classify questioned expenses as business related. These amounts included \$1.3 million related to inventory, \$884,503.90 related to overcompensation and loans involving LA Micro employee Mike Lev, \$629,712.39 related to

² The court issued a tentative opinion on April 19, 2016. Various parties objected to that tentative, and Lyampert requested a statement of decision. The parties then submitted numerous filings proposing what the statement of decision should contain. The trial court issued an initial statement of decision on September 1, 2016. Following further objections and briefing, the court issued a revised statement of decision on January 11, 2017 and made clear the revised statement of decision superseded the prior September 1, 2016 version. We look only to the January 11, 2017 statement of decision as the court retained the power to change its findings of fact and conclusions of law until judgment was entered. (*Bay World Trading, Ltd. v. Nebraska Beef, Inc.* (2002) 101 Cal.App.4th 135, 141.)

adjusting journal entries, \$550,052.66 related to transactions with a vendor named Global Business Systems (GBS) owned by a longtime friend of Lyampert, \$461,424.63 in credit card charges, \$106,499.20 in cash withdrawals, and \$823.68 in car payments.

The court also found, based on the Neutral Accountant's work, that various expenditures were legitimate LA Micro business expenses, and not subject to reimbursement by Lyampert. As pertinent to this appeal, those included \$424,089.14 in ATM and cash transactions, \$143,166.25 in leasehold improvements, \$131,080.69 in car payments, and \$405,317.36 in payments to a vendor named Twin Cities owned by Lyampert.

2. DCI's Breach of Contract Claim

The court found LA Micro had an oral contract with DCI, and failed to pay money owed on that contract for the three months plus one week leading up to Gorban's departure from LA Micro. While DCI asserted it was owed \$243,078, the court awarded \$221,000. The court declined to award prejudgment interest.

3. LA Micro and Lyampert's Cross-Complaint

The court rejected LA Micro and Lyampert's breach of fiduciary duty claim against Frenkel, finding Frenkel had a right to dissolve LA Micro and thereafter form a competing company, and did not engage in the secret plan to destroy LA Micro that Lyampert alleged. The court further rejected the fiduciary duty claim on the basis that LA Micro continued to exist after Frenkel sought dissolution because Lyampert wanted to keep it for himself and deprive Frenkel of Frenkel's ownership share in the business.

The court rejected LA Micro and Lyampert's trade secret claim, finding LA Micro's sales and customer information in its QuickBooks software (the purported trade secrets) were not trade secrets, and did not give a competitive advantage to either LA Micro or ITC. The court found Frenkel had not used improper means to acquire any trade secret information, but rather had protected himself by taking a copy of certain accounting records "because his business partner was in the habit of spending company money on his personal needs and wants, and he wanted to preserve the evidence."

While it found against LA Micro and Lyampert on the misappropriation of trade secrets claim, the court held that claim was brought in good faith to protect LA Micro's interest in potential trade secret data, and not to harass, delay, or thwart competition by ITC. Accordingly, it rejected a request by ITC and its employees for an award of attorneys' fees under the Uniform Trade Secrets Act, Civil Code section 3426.4, which permits fee awards for misappropriation of trade secret claims brought in bad faith.

4. Calculation of Payments in the Judgment

As noted above, Lyampert was found to owe LA Micro repayment totaling \$4,305,753.33. LA Micro, in turn, owed DCI \$221,000. Rather than have Lyampert pay \$4,305,753.33 to LA Micro, and then dividing that money by first giving \$221,000 to DCI followed by splitting the remaining \$4,084,753.33 into two ownership shares and giving \$2,042,376.67 each to Lyampert and Frenkel, the court ordered LA Micro's recovery from Lyampert (its only asset sufficient to pay DCI) be paid out as follows: Lyampert was to pay DCI \$221,000 and Frenkel \$2,042,376.67.

L. Posttrial Proceedings

Judgment was entered February 22, 2017. On March 24, 2017, LA Micro and Lyampert moved for a new trial, arguing the court erred in ordering Lyampert to pay \$221,000 to DCI. The court denied that motion on April 21, 2017. LA Micro, Lyampert, Frenkel, DCI and ITC and its employees filed timely notices of appeal from the judgment.³

DISCUSSION

The parties raise a number of overlapping contentions in their various appeals. We first address LA Micro and Lyampert's claim of error with regard to their breach of fiduciary duty claim against Frenkel. We then discuss the various claims of Lyampert and Frenkel concerning the accounting, before turning to issues raised regarding the \$221,000 judgment in favor of DCI. We next address the argument of ITC and its employees that the trial court erred in not awarding attorney fees. We then discuss Frenkel's request that we engage in fact finding pursuant to Code of Civil Procedure 909 regarding the ownership of LAMUK, or alternatively that we find the trial court abused its discretion in denying his motion to amend to bring claims related to that

³ On June 30, 2017, LA Micro and Lyampert filed a separate notice of appeal regarding costs awarded against them. We ordered that appeal consolidated with the existing appeal. LA Micro and Lyampert's appellate briefs raise no issue regarding costs, and we therefore deem LA Micro and Lyampert to have abandoned any such claims. (E.g., *Wall Street Network, Ltd. v. New York Times Co.* (2008) 164 Cal.App.4th 1171, 1177 [failure to address a claim on appeal constitutes abandonment of that claim].)

entity. We conclude by addressing Frenkel’s claim the trial court erred in not awarding him punitive damages.

A. Standard of Review

“In reviewing a judgment based upon a statement of decision following a bench trial, we review questions of law de novo. [Citation.] We apply a substantial evidence standard of review to the trial court’s findings of fact. [Citation.] Under this deferential standard of review, findings of fact are liberally construed to support the judgment and we consider the evidence in the light most favorable to the prevailing party, drawing all reasonable inferences in support of the findings.” (*Thompson, supra*, 6 Cal.App.5th at p. 981.)⁴

B. The Trial Court Did Not Err in Rejecting the Breach of Fiduciary Duty Claim Against Frenkel

LA Micro and Lyampert contend the trial court erred in finding Frenkel did not breach his fiduciary duty to LA Micro. In their view, Frenkel continued to owe a fiduciary duty after giving notice on February 8, 2010 of his intent to dissolve LA Micro, because despite having no management authority and taking no action on LA Micro’s behalf after that time, Frenkel did not take the additional step of formally resigning from his corporate positions as CFO and director.⁵ They argue Frenkel breached

⁴ To the extent an issue raised by the parties has a more particularized standard of review, that standard is set forth below in the section addressing that issue.

⁵ LA Micro and Lyampert do not allege any breach of fiduciary duty before February 8, 2010.

this purported fiduciary duty when he helped set up a competing business (ITC), recruited LA Micro employees to work at ITC, and solicited LA Micro's largest customers to do business with ITC, thereby damaging LA Micro.

While LA Micro, Lyampert, and Frenkel all assert the court found Frenkel owed no fiduciary duty after February 8, 2010, the court made no explicit finding in that regard. While the court did state that after February 8, 2010 "Frenkel was an officer in name only," that finding was made in response to Lyampert's claim that Frenkel continued to control aspects of LA Micro after that date, and the court drew no conclusion from it regarding the existence or non-existence of a fiduciary duty. Generally speaking, "an officer who participates in management of the corporation, exercising some discretionary authority, is a fiduciary of the corporation as a matter of law. Conversely, a 'nominal' officer with no management authority is not a fiduciary." (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 420-421 (*GAB*), disapproved on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th 1140, 1154.) However, when a corporate officer previously participated in management, and then loses power or authority, typically "that officer still owes a fiduciary duty to the corporation." (*Id.* at p. 421.)⁶

⁶ This requirement exists because an officer "having once enjoyed actual authority to deal with third parties on behalf of the corporation, is likely to retain apparent authority to do so, so long as he or she remains an officer." (*GAB, supra*, 83 Cal.App.4th at pp. 421–422.) We note that LA Micro and Lyampert do not argue that any third party was under the mistaken impression after February 8, 2010 that Frenkel was an

While the parties extensively debate the import of the court's finding that Frenkel was an officer in name only after February 8, 2010, the statement of decision makes clear the trial court focused on the forest, rather than individual trees. Instead of parsing whether Frenkel was or was not a fiduciary (and if so, for what purposes) after February 8, 2010, the trial court undertook a much more expansive analysis, finding as follows:

“Roman Frenkel decided to dissolve the company, serving Arkadiy Lyampert with a notice of dissolution on February 8, 2010. Roman Frenkel left the premises that day and did not return to transact business on behalf of LA Micro.

“Arkadiy Lyampert kept control of the business. . . . It probably would have been a relatively simple thing to wind up LA Micro by selling the existing inventory or trying to find a buyer for the business. Arkadiy Lyampert, however, exercised his right to an appraisal under Corporations Code 2000, starting a process which took approximately 1 1/2 years, thereby avoiding a prompt ‘winding up.’ . . . [¶] . . . [¶]

“Arkadiy Lyampert argues that Roman Frenkel and cross-defendants implemented a secret plan to destroy LA Micro and Arkadiy Lyampert, by draining LA Micro of cash and credit; disabling LA Micro's website and e-mail system; cutting off access to the financial and trade secret data to run LA Micro; taking inventory from LA Micro; raiding LA Micro employees; taking the LA Micro trade secret and financial records; and misappropriating trade secrets.

active director or officer of LA Micro, or that Frenkel sought to bind LA Micro in any dealings with third parties after February 8, 2010.

“These claims do not hold up to scrutiny.

“Roman Frenkel was unquestionably secretive in his plans to leave LA Micro and to participate in the formation of ITC. The reasons are not entirely clear. Whether it was out of embarrassment, fear, or some other reason, what is also not clear is why there was any legal prohibition on Roman Frenkel giving notice of dissolution of LA Micro and starting a new company that was in competition with LA Micro.

“As a 50% owner, Roman Frenkel had an absolute right to dissolve the company and form a competing company. What complicated matters is that Arkadiy Lyampert resisted the dissolution . . . [¶] [and] wanted to keep LA Micro as a going business. What obligation, however, did Roman Frenkel have to keep it as a going business? What obligation did the current employees have to stay once notice was served that a 50% owner wanted it dissolved? The Court is entirely unconvinced that either Roman Frenkel or any of the employees had any such obligation. . . .

“[While Lyampert could have agreed to dissolution or bought out Frenkel’s interest, the] most likely reason [he did not] is that Arkadiy Lyampert wanted to keep LA Micro for himself and did not want Roman Frenkel to get any economic benefit from either LA Micro’s operations or from the sale of anyone’s interest in it.”

Frenkel argues LA Micro and Lyampert have waived their challenge to the sufficiency of these factual findings by failing to summarize the evidence both favorable and unfavorable, and showing how and why the evidence is insufficient. (*Hjelm v. Prometheus Real Estate Group, Inc.* (2016) 3 Cal.App.5th 1155,

1166 (*Hjelm*); *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.) We agree. LA Micro and Lyampert’s opening brief essentially recites Lyampert’s version of events—assertions which the trial court held “do not hold up to scrutiny”—and ignores the contrary evidence on which the trial court relied. “[S]uch “factual presentation is but an attempt to reargue on appeal those factual issues decided adversely to [LA Micro and Lyampert] at the trial level, contrary to established precepts of appellate review. As such, it is doomed to fail.” [Citation.]’ [¶] And fail it does, as we deem the argument waived.” (*Hjelm, supra*, 3 Cal.App.5th at p. 1166.) Even if we did not deem the sufficiency challenge waived, it lacks merit as there is substantial evidence in the record to support the court’s findings, and we are “ ‘ “without power to substitute [our] deductions for those of the trial court. . . . [S]o long as there is substantial evidence for the trial court’s finding], *it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*” ’ ” (*Whitney v. Montegut* (2014) 222 Cal.App.4th 906, 912.)

With regard to the legal import of the court’s factual findings, “[t]he significant inquiry in each [breach of fiduciary duty] situation is whether the officer’s acts or omissions constitute a breach under the general principles applicable to the performance of his trust.” (*Bancroft-Whitney Co. v. Glen* (1966) 64 Cal.2d 327, 347.) The cases on which LA Micro and Lyampert rely all involve actions by a corporate officer detrimental to the corporation before leaving for a competitor. (E.g., *id.* at pp. 334–341 [while an active officer of plaintiff corporation, defendant signed secret employment agreement with competitor,

provided confidential information to competitor, and solicited employees to join him at competitor]; *GAB, supra*, 83 Cal.App.4th at p. 424 [similar facts to *Bancroft-Whitney*].) LA Micro and Lyampert unsurprisingly cite no case finding a breach of fiduciary duty after an officer seeks dissolution and publicly disassociates himself from the prior company, much less one where the party claiming an ongoing fiduciary duty frustrates and prolongs the dissolution for improper purposes.

Here, the complained of actions occurred essentially contemporaneously with or after Frenkel provided a written notice of dissolution and ceased any action on behalf of LA Micro. In light of all the other evidence, the mere fact Frenkel did not also formally resign his corporate positions after the notice of dissolution did not as a matter of law require the court to find a breach of a fiduciary duty, causation, and damages. As the court noted, the Corporations Code explicitly allows an officer to seek dissolution, and Frenkel's exercise of that right did not breach any fiduciary duty. After providing the notice of dissolution, Frenkel disassociated himself from any further action on behalf of LA Micro. He created a new business as allowed by California's employee mobility laws (e.g., Bus. & Prof. Code, § 16600), and did not compete unfairly in opening or operating the new business. For example, the court did not find that Frenkel improperly solicited LA Micro's employees, but rather that those employees had a right to leave of their own accord and did so. Indeed, it was not in Frenkel's interest to harm LA Micro because he remained a 50 percent owner of the corporation. To the extent that LA Micro continued, it was because Lyampert wanted LA Micro to remain operational for the improper purpose of depriving Frenkel of his 50 percent ownership share.

Lyampert's insistence that Frenkel was further required to formally resign his corporate position, and thereby disadvantage himself while Lyampert was effectively attempting to steal LA Micro away from Frenkel (including breaching Lyampert's fiduciary duty to account for Frenkel's interest), is inequitable to say the least. The court did not err in finding LA Micro and Lyampert were not entitled to any recovery on the breach of fiduciary duty claim.

**C. The Trial Court Did Not Err in Adopting
the Findings of the Neutral Accountant**

Lyampert and Frenkel both raise claims of error regarding the accounting. Frenkel argues the court improperly delegated a judicial function to the Neutral Accountant by following the very accounting and fact-finding process to which Frenkel stipulated. He also argues the court erred in determining (based on the Neutral Accountant's stipulated work) that certain ATM and cash transactions, leasehold improvements, car payments, and vendor payments to Twin Cities were appropriate LA Micro business expenses.

Lyampert argues the trial court improperly imposed upon him the burden of proof, and he should not have been required to reimburse expenses incurred during his exclusive control of LA Micro that he could not substantiate as being business related. Lyampert also alleges various factual and legal errors with regard to three categories of expenses found to be inconclusive, and thus subject to reimbursement by him: \$1.3 million in inventory, \$629,712.39 in adjusting journal entries, and \$550,052.66 in payments to LA Micro vendor GBS.

We first address the question of whether the parties waived any of these arguments by failing to move for a new trial, before turning to the arguments themselves.

1. Waiver of Factual Arguments

Frenkel argues Lyampert waived his challenges to the accounting computations by failing to move for a new trial.⁷ “‘Ordinarily, errors are not waived on appeal by the failure to make a motion for new trial.’” (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 759 (*Greenwich*).) Where ascertainment of damages “‘turns on the credibility of witnesses, conflicting evidence, or other factual questions, [however, a damages] award may not be challenged for inadequacy for the first time on appeal.’” (*Ibid.*) This rule applies whether the case was tried by a jury, or a court without a jury. (*Glendale Federal Savings and Loan Association v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 122 [collecting cases].) The purpose of this rule is to avoid unnecessarily burdening the appellate court with issues that can and should be resolved at the trial level. (*Greenwich, supra*, 190 Cal.App.4th at p. 759.) “[T]he failure to move for a new trial does not preclude a party from asserting [legal] error in the trial of damages issues—e.g., erroneous evidentiary rulings, instructional errors, or failure to apply the proper measure of damages.’” (*Ibid.*)

Lyampert primarily makes legal arguments regarding the allocation of the burden of proof and the denial of his request to reexamine the Neutral Accountant, as to which he was not

⁷ While Lyampert did move for a new trial, the only issue raised in that motion related to the order he personally pay DCI \$221,000, and not any other issue.

required to move for a new trial. To the extent he raises factual arguments about the evidence supporting the court's findings, however, Lyampert waived those arguments by failing to move for a new trial on those issues. (*Greenwich, supra*, 190 Cal.App.4th at p. 759.)

While Frenkel raises waiver arguments as to Lyampert's accounting challenges, he acknowledges that he also did not move for a new trial on any of the accounting computations. Frenkel has not waived his legal argument that the court improperly delegated a judicial function to the Neutral Accountant, but he has waived his factual arguments concerning the sufficiency of the evidence on those accounting items he now challenges.

Even if the parties had not waived their factual challenges, we would nevertheless affirm because as explained below the court's findings on the challenged categories are supported by substantial evidence.

2. *Frenkel's Challenges to the Accounting*

(a) *The Court Did Not Impermissibly Delegate a Judicial Function to the Neutral Accountant*

As summarized above, the parties proposed an accounting procedure involving a qualified third party expert, and agreed to be bound by the conclusions of that expert to reduce the cost and complexity of trial. Without any apparent recognition of the internal inconsistency of his position, Frenkel argues the court's adoption of the Neutral Accountant's findings in his favor was totally fine and should be affirmed, while on the other hand insisting the trial court improperly delegated its authority to the

Neutral Accountant such that we should reverse those categories of transactions decided adversely to him.

The agreed upon accounting included reporting “on transactions that appear to be outside of the ordinary course of business operations, personal expenses, inappropriate business expenses, unusual items, distributions and/or dividends to members or insiders, inconsistent benefits between members, transfers of assets or interests, loans to and from the company, and member/insider compensation” Each of the four categories about which Frenkel now complains—cash transactions, leasehold improvements, car payments, and payments to Twin Cities—fell within the scope of this stipulation.

Frenkel and Lyampert’s stipulation to this accounting procedure and acceptance of its results remains binding. Neither party can now contradict the stipulated facts that resulted from it. (*Robinson v. Workers’ Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 790; *Leonard v. City of Los Angeles* (1973) 31 Cal.App.3d 473, 477.) Moreover, this procedure did not delegate any judicial function to the Neutral Accountant. The court accepted the Neutral Accountant’s determination of whether transactions were appropriate LA Micro business expenses only after cross-examination and presentation of additional evidence by Frenkel and other interested parties. The court was an active participant in the fact finding, and to the extent it was not satisfied with the Accountant’s conclusion on certain issues, it requested additional analysis before deciding whether to adopt the Neutral Accountant’s determination.

The facts here are distinct from the primary authority on which Frenkel relies, *De Guere v. Universal City Studios, Inc.*

(1997) 56 Cal.App.4th 482. In that case, a referee was appointed to conduct an accounting of net profits owed under a television production contract. (*Id.* at pp. 487–488.) The *De Guere* court found the referee could conduct the accounting, including determination of the proper accounting methodology, but exceeded his authority by making findings on the enforceability of the contract at issue, including findings regarding the parties’ intent and whether the contract was one of adhesion. (*Id.* at p. 501.) Here, in contrast, the Neutral Accountant confined his findings to those relating to the accounting itself (including what the evidence indicated under the relevant accounting standards), and did not decide any issue within the exclusive province of the court. As the trial court expressly noted in its statement of decision, while the court “has found the parties agreed to be bound by the Accountant’s identification of specific numerical calculations, . . . the Court did not abdicate its authority to independently determine factual issues outside of those calculations.”

(b) *Substantial Evidence Supports the
Itemizations Frenkel Contests*

Even if Frenkel had not waived his factual challenges to the four categories of itemizations he contests, substantial evidence supports each of them. While Frenkel argues additional evidence was required to support the court’s findings, we review the whole record for substantial evidence, and do not focus on isolated bits of evidence or lack of evidence. (*People v. Cuevas* (1995) 12 Cal.4th 252, 260.) The substantial evidence with regard to these four categories is as follows.

Cash Transactions: Frenkel claims the court erred in determining \$424,089.14 in ATM and cash transactions were business related. The Neutral Accountant analyzed \$530,588.34 of ATM and cash transactions. He checked the transactions against LA Micro's QuickBooks file to confirm they were recorded, and to identify the purpose of the withdrawal. He then classified the transactions as a business expense, not a business expense, or inconclusive. If the Neutral Accountant could trace a transaction to "a purchase order or accounts payable for a vendor in QuickBooks," the transaction was business related. The Accountant was able to trace the \$424,089.14 Frenkel questions to source documents that evidenced a business-related purpose.

Leasehold Improvements: Frenkel argues the court erred in finding \$143,166.25 in leasehold improvements were business related. In his final report before phase one of the trial, the Neutral Accountant classified 47 transactions as "Leasehold Improvements" totaling \$143,166.25. Lyampert provided no documentation with regard to those charges, and the Accountant could not determine whether LA Micro or another entity benefited from the expenses. Following phase one of the trial and cross-examination of the Accountant, the court requested additional analysis on leasehold improvements as part of a supplemental report. In the supplemental report, the Accountant noted these transactions had been recorded in LA Micro's QuickBooks. The Accountant concluded from an accounting perspective the QuickBooks records were "materially correct," although not entirely consistent with best accounting practices. Because the money was spent and recorded, and because the Accountant did not have any information that another entity benefited from the expenditures, he concluded "the full

\$143,166.25 of leasehold improvement expenditures should be reclassified as a business related expense.”

Car Payments: Frenkel argues the trial court erred in finding \$131,080.69 in car payments were business related. The questioned car expenses were recorded in QuickBooks, and the Accountant “verified them to the bank statements” and confirmed “that payments for vehicles were made by the Company.” The Accountant could not determine, however, whether the cars had been used for business or personal purposes. Frenkel argued during phase one of the trial that car payments on behalf of Lyampert and others had been of no benefit to LA Micro. At the trial court’s request, the Accountant re-analyzed the car payments in his supplemental report, and determined from an accounting perspective that it is not unreasonable for a business owner to expense or otherwise have the business pay for his or her vehicle or vehicles, regardless of the amount of personal versus business usage. Consequently, \$131,080.69 of car payments were re-classified as business-related.

Twin Cities: Frenkel claims \$405,317.36 in payments to Twin Cities should not have been categorized as business related. The Accountant verified that the products purchased appeared reasonable and were properly supported in QuickBooks. The Accountant further verified that an account payable was present for each payment to Twin Cities, and scrutinized a selection of transactions at various dollar amounts and at different points in time to determine if LA Micro made similar purchases at similar prices from other vendors. Based on this analysis, the Accountant was satisfied that items ordered from Twin Cities were similar in description and cost as items ordered from other vendors, and thus legitimate business expenses.

3. *Lyampert's Challenges to the Accounting*

(a) *The Court Properly Allocated Lyampert the Burden to Prove Transactions Were Business Related*

Lyampert contends the court erred when it allocated to him the burden to prove questioned LA Micro transactions were business related. He contends that shifting the burden was contrary to law because Frenkel also had access to evidence relevant to these categories. In Lyampert's view, the court could not shift the burden to him unless Lyampert had *exclusive* possession of all relevant records (including records before as well as after February 8, 2010), such that it would be impossible for Frenkel to prove his case.

A "burden of proof may change or shift where there is a greater or almost exclusive availability of evidence to one party." (*Phillip D. Bertelsen, Inc. v. Agricultural Labor Relations Bd.* (1992) 2 Cal.App.4th 506, 517.) While Frenkel may have had pre-February 8, 2010 records, Lyampert ignores the trial court's finding that he had exclusive control of LA Micro's books and records after February 8, 2010—the primary focus of the accounting. The trial court found that "since Arkadiy Lyampert was exclusively positioned to be able to establish the bona fides (if any) of LA Micro's transactions after February 8, 2010, the burden was on Arkadiy Lyampert to justify LA Micro's expenses as business-related."

Placing the burden of proof on Lyampert for the accounting issues was not error. "In determining whether the normal allocation of the burden of proof should be altered, the courts consider a number of factors: the knowledge of the parties

concerning the particular fact, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or nonexistence of the particular fact. In determining the incidence of the burden of proof, “the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations.” ’ ’ ” (*Webster v. Trustees of Cal. State University* (1993) 19 Cal.App.4th 1456, 1463.)

In an accounting action, an “ ‘agent has the burden of proving that he paid to the principal or otherwise properly disposed of the money or other thing which he is proved to have received for the principal.’ ” (*Kennard v. Glick* (1960) 183 Cal.App.2d 246, 251.) Based on Lyampert’s exclusive control of LA Micro following Frenkel’s separation on February 8, 2010, Lyampert sat in the place of an agent, and owed a fiduciary duty to Frenkel to account for the monies received into and expended by LA Micro after that time. It was therefore appropriate to impose the burden of proof on the accounting issues on Lyampert, even though he was nominally the defendant as to that claim.

For example, in *Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App.3d 1035, the remaining partners of a law firm were responsible for keeping proper financial records regarding fees owed to the departing partners. (*Id.* at p. 1051.) The remaining partners’ failure to keep proper records meant the trial court was justified in imposing the burden of proof, and thus the consequences of a failure of proof, on the remaining partners. (*Id.* at pp. 1051–1052.) The *Rosenfeld* court further reasoned that shifting this burden to a fiduciary who has not kept adequate records was especially appropriate “where the

fiduciary's failure is deliberate and for the purpose of frustrating recovery by the beneficiary.” (*Id.* at p. 1052.) Here, the trial court found exactly that—stating “Lyampert wanted to keep LA Micro for himself and did not want Roman Frenkel to get any economic benefit from either LA Micro’s operations or from the sale of anyone’s interest in it.”

(b) *There Was No Error in the Inventory Determination*

Lyampert contends the court’s inventory finding must be reversed because the statement of decision does not include sufficient detail regarding the basis of the \$1.3 million inventory calculation, and further because there was not substantial evidence to support the court’s \$1.3 million valuation of this item. We reject both these arguments.

Lyampert’s challenge assumes the trial court was required to explain why it changed its approach to the inventory issue from the September 2016 initial statement of decision (which did not charge Lyampert with \$1.3 million in inventory) to the January 2017 statement of decision (which did charge him with that amount). We decline to consider the superseded initial statement of decision. Because we review the correctness of the final order, we may not consider the court’s prior comments or opinions to impeach its final decision. (*Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451.)

With regard to his substantial evidence claim, Lyampert waived it by failing to move for a new trial on that issue. (*Greenwich, supra*, 190 Cal.App.4th at p. 759.) Even if he had preserved the issue, there is substantial evidence supporting the court’s determination that the inventory category totaled

\$1,300,000. While the statement of decision does not include a detailed explanation of the \$1.3 million figure, it complied with Code of Civil Procedure 632 because the Neutral Accountant's report, which was the basis of the court's finding pursuant to the parties' stipulation, explained the inventory figure of \$1.3 million came from the copy of QuickBooks provided by Lyampert: "As of the cessation of LA Micro's business activities, the operative copy of QuickBooks reflected an inventory of approximately \$1.3 million." This same QuickBooks copy showed that LA Micro's beginning inventory on February 8, 2010 had zero value. Subtracting the beginning value from the ending value showed an increase of \$1.3 million. Comparing this \$1.3 million to the numbers provided by Frenkel's version of QuickBooks, and doing rough calculations to estimate the postseparation increase in LA Micro's inventory, the Accountant found the numbers were "not exact" but "comparable."

*(c) There Was No Error in the Adjusted
Journal Entries*

Lyampert contends that the \$629,712.39 in adjusted journal entries category were not factually distinct from the \$1.3 million inventory category, and therefore constituted an impermissible double recovery. Lyampert raised this claim in the trial court, which rejected it "as the Accountant did not make that conclusion, and Lyampert had the opportunity to ask him if it was included" in the inventory figure such that it would be a double recovery, but did not. Moreover, the court found the adjusting entries related to a different time frame than the inventory figure.

Lyampert had an opportunity to object, to submit contrary evidence, and to cross-examine the Neutral Accountant on the possibility that the adjusted journal entries duplicated amounts already represented in the inventory figure. He failed to do so. While Lyampert urges us to speculate that a double recovery might exist, his failure to identify any such evidence before the trial court, his failure to move for a new trial, and the substantial evidence that the categories were distinct in time forecloses his argument.

(d) There Was No Error in the GBS Transactions

The Neutral Accountant's final report found that \$2,545,745.71 in challenged transactions with LA Micro's vendor GBS were all business related. His supplemental report—prepared at the request of the court after the Accountant was questioned by the parties during the first phase of trial—reached a different conclusion. That supplemental report determined that after further examination, the Accountant could no longer reliably state that \$550,052.66 of those transactions were business related. The change was based on the discovery that LA Micro's QuickBooks showed LA Micro “began to write checks to GBS [in February 2011] that did not necessarily pay down a corresponding bill. In total, the amount of money paid to GBS that does not have a corresponding bill was \$550,052.66.” The Accountant therefore determined “the amount should be moved to the inconclusive category,” which meant Lyampert was charged with it.

Lyampert contends the trial court erred when it refused his requests to recall and reexamine the Neutral Accountant, and to

present further evidence, after this change in categorization in the supplemental report. “A motion to reopen a case for further evidence can be granted only on a showing of good cause. [Citation.] Reopening is not a matter of a right but rests upon the sound discretion of the trial court. That discretion should not be overturned on appeal absent a clear showing of abuse.” (*Sanchez v. Bay General Hospital* (1981) 116 Cal.App.3d 776, 793.)

We find no abuse of discretion. Following the final report and cross-examination of the Neutral Accountant, the trial court declined to reopen evidence on the issues litigated in phase I, because that phase of the trial was complete and the parties had agreed to be bound by the Accountant’s conclusions. Furthermore, the court noted Lyampert had previously insisted the parties were irrevocably bound by the Accountant’s determinations (a position he was now contradicting), submitted no additional evidence on the GBS transactions during phase one, and in requesting to reopen had not proffered any evidence that would compel a different result. (E.g., *Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 329 [no abuse of discretion excluding evidence when party fails to make specific offer of proof setting forth actual evidence sought to be introduced, as opposed to facts or issues to be addressed in proposed witness examination].)

D. The Trial Court Did Not Err in Finding \$221,000 in Damages on DCI’s Contract Claim, Nor in Ordering Lyampert to Pay that Amount

The trial court awarded DCI \$221,000 in breach of contract damages. DCI contends that amount was insufficient, and the trial court further erred in not awarding DCI prejudgment

interest. Lyampert contends the trial court erred in holding him personally responsible, on an alter ego theory, for LA Micro's \$221,000 obligation to DCI. These various contentions are meritless.

1. Factual Background

DCI alleged its oral contract with LA Micro compensated DCI for sales support to LA Micro at a monthly rate of 20 percent of the difference between LA Micro's gross revenues and certain specified expenses. After leaving LA Micro, Gorban sent LA Micro a letter on February 16, 2010 demanding \$221,000 for services rendered by DCI. LA Micro responded three days later, denying any factual basis for DCI's claim and stating it had no record "of *ever* receiving any prior invoices, statements or bills from your company that would have indicated that there was a balance outstanding." LA Micro's response further noted LA Micro had paid DCI \$101,330 two weeks before DCI's demand letter.

Once the litigation began, DCI alleged LA Micro had been misrepresenting its revenues to DCI, and paid DCI nothing for December 2009 through February 2010. DCI asserted LA Micro began breaching the contract as early as April 2008 by failing to provide DCI with adequate reporting of LA Micro's revenues and expenses necessary to calculate the 20 percent fee. DCI asserted it asked LA Micro to account for LA Micro's revenue and expenses for the years 2008, 2009, and January and February of 2010, and LA Micro refused. DCI's complaint asserted damages in excess of \$700,000, but it later reduced its damages calculation to \$243,078.

In reviewing the facts adduced at trial, the court found “the evidence, while weak, to be sufficient to support the claim of unpaid fees to DCI” for December 2009 through the beginning of February 2010. Although Lyampert denied any agreement, there was evidence Frenkel had been paying DCI according to the compensation formula that DCI alleged. The court found the parties had formed an oral contract, and LA Micro had breached that contract. The court did not make any findings as to the specific terms of the parties’ agreement, noting the agreement was reached during “vodka-infused discussions . . . at a Russian restaurant called ‘Red Square’,” and that “there was no written agreement memorializing the[] discussions.”

With regard to damages, the court noted the difficulty in determining the precise amount owed because of the parties’ poor recordkeeping, including that the bookkeeping supporting prior payments to DCI was “crude” and “weak.” The court found the appropriate damage award was \$221,000, which was the amount DCI had demanded in its contemporaneous February 16, 2010 letter to LA Micro. Due to the difficulty in determining the precise amount owed, the court declined to award prejudgment interest.

DCI did not file a motion for a new trial on this or any other issue.

2. The Trial Court Did Not Err in Finding the Damages Were \$221,000

DCI contends the trial court committed reversible error by awarding \$221,000 rather than the \$243,078 DCI now estimates as its damages. Lyampert argues DCI waived this challenge by failing to move for a new trial. (*Greenwich, supra*, 190

Cal.App.4th at p. 759.) DCI acknowledges that it did not move for a new trial, but contends there is no waiver because its claim is legal one. DCI frames its argument as the trial court erring by legally estopping DCI from recovering more damages than demanded in DCI's February 16, 2010 letter. We reject this claim, as the trial court did not employ an estoppel theory. The court did not find DCI was barred from recovering any amount greater than its initial demand. Rather, it awarded \$221,000 because that was the only reliable figure (weak as it was) in a sea of murky, crude, and even weaker evidence. Indeed, DCI admits actual damages could not be calculated because there was no record of the actual cost of the items sold during this period (one of the expense categories in the alleged compensation formula). The court accordingly did not err in finding DCI's contemporaneous calculation of the amount owed, before the specter of litigation, the most reliable figure on which to base damages.

3. Prejudgment Interest Was Not Required

DCI contends the trial court erred in not awarding prejudgment interest on what it describes as “a liquidated contract claim.” Civil Code section 3287, subdivision (a) provides for the award of prejudgment interest where the damages are “certain, or capable of being made certain by calculation . . .” and the person has a “right to recover which is vested on the person upon a particular day”⁸ “Under this provision, prejudgment

⁸ Civil Code section 3287, subdivision (b) provides that a party awarded damages for an unliquidated breach of contract may recover prejudgment interest from a date that the court, in its discretion, may fix. Presumably because of the discretionary

interest is allowable where the amount due plaintiff is fixed by the terms of a contract, or is readily ascertainable by reference to well-established market values.” (*Leaf v. Phil Rauch, Inc.* (1975) 47 Cal.App.3d 371, 375.) If, however, “the amount of the damages depends upon a judicial determination based upon conflicting evidence and is not ascertainable from established market prices or values,” the recovering party is not entitled to prejudgment interest. (*Ibid.*) “The test we glean from prior decisions is: did the *defendant* actually know the amount owed or from reasonably available information could the defendant have computed that amount. Only if one of those two conditions is met should the court award prejudgment interest.” (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 907 (*Chesapeake*).)

Where pertinent facts have been established by trial court findings supported by substantial evidence, we independently review whether and when damages were made certain or capable of being made certain by calculation. (*Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279, 296.) While DCI tries to characterize its claim as involving a fixed, readily ascertainable amount, the evidence was to the contrary. As noted above, DCI admits its actual damages could not be calculated because there was no record of the actual cost of the items sold during this period. DCI’s February 16, 2010, letter did not provide LA Micro with the factual bases for its claim or with the means of calculating the amount due. Even after LA Micro replied on February 19, 2010 that it saw no basis for DCI’s claim,

nature of subdivision (b), DCI argues only the mandatory provisions of subdivision (a).

Gorban still did not provide LA Micro with invoices or other means of calculating the alleged obligation.

In addition, after Gorban left LA Micro, the staff responsible for calculating DCI's payments, Frenkel and Olga Durova, also departed LA Micro, which supported the inference that Lyampert lacked the resources to compute the amount owed. Lyampert also knew that LA Micro had recently paid DCI substantial sums. Lyampert testified that on February 5, 2010, just before Frenkel and Gorban left LA Micro, Lyampert noticed four large, unexplained payments to DCI: checks for \$235,120, \$135,022, \$82,950, and \$68,810. The last two checks were dated January 8, 2010, just a month before Gorban left. The existence of these substantial recent payments to DCI further complicated the calculation of how much, if anything, was due DCI.

Finally, we note that DCI's complaint alleged damages "in excess of \$700,000" and requested an accounting to determine the revenues and expenses necessary to calculate its fee. Although a minor discrepancy between the claimed amount and the actual award does not bar prejudgment interest, a large discrepancy like the 70 percent reduction here from complaint to award is an indication the claim was not calculable with certainty. (*Chesapeake, supra*, 149 Cal.App.3d at p. 910.) Similarly, when a party asserts the need for an accounting to determine the amount due, that indicates uncertainty such that prejudgment interest is not allowed. (*Id.* at p. 908 [collecting cases].)

Because there was substantial evidence Lyampert and LA Micro did not actually know the amount owed to DCI, or could have computed that amount from reasonably available

information, the court did not err in declining to award prejudgment interest.

**4. *The Court Did Not Err in Ordering
Lyampert to Pay DCI***

Lyampert claims the trial court erred in making him personally responsible for paying DCI the \$221,000 judgment, which he claims was tantamount to the court making an alter ego finding. Lyampert's argument purposefully misconstrues the trial court's order, which did not involve piercing the corporate veil but simple math.⁹

As noted above, Lyampert was found to owe the dissolved corporation LA Micro \$4,305,753.33. Rather than the unnecessarily complicated procedure of having Lyampert pay \$4,305,753.33 to LA Micro, and then allocating \$221,000 of that sum to DCI before splitting the remaining \$4,084,753.67 between Lyampert and Frenkel (which would be \$2,042,376.67 each), the court instead cut straight to the bottom line. It ordered LA Micro's recovery from Lyampert (its only asset significant enough to fund the money owed to DCI) to be paid out in the following way: Lyampert was to pay DCI (LA Micro's creditor) \$221,000, and to pay Frenkel \$2,042,376.67. This meant both Lyampert and Frenkel, as 50/50 owners of LA Micro, shared equally in the debt owed by LA Micro to DCI, and equally in LA Micro's assets following payment of that outstanding obligation.

⁹ Prior to trial, the court severed DCI's claim for alter-ego liability, postponing it unless and until there was a finding against LA Micro, and LA Micro could not pay any resulting award. The court's statement of decision expressly noted it was not making any finding on alter-ego.

In a dissolution, a trial court has a broad authority to make “such orders and decrees . . . as justice and equity require.” (Corp. Code, § 1804; *Gold v. Gold* (2003) 114 Cal.App.4th 791, 804–805.) This includes providing for payment of “all debts and liabilities not actually paid” by the corporation (Corp. Code, § 1806, subd. (i)), and distributing any remaining corporate assets “for the benefit of the persons entitled thereto” (Corp. Code, § 2010, subd. (c)). The court did not abuse that broad discretion in its method of ensuring LA Micro’s obligations were paid, and the remaining amount returned equally to its two shareholders.

E. The Court Did Not Err in Denying the ITC Parties’ Claim for Attorneys’ Fees

ITC and its employees (collectively the ITC defendants) contend that under the Uniform Trade Secrets Act, their reasonable attorney’s fees should have been awarded because Lyampart’s cross-claim for misappropriation of trade secrets was brought in bad faith. We reject this claim.

1. Standard of Review

A trial court’s ruling on attorney fees “will not be overturned in the absence of a manifest abuse of discretion, a prejudicial error of law, or necessary findings not supported by substantial evidence.” (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 577.) Where “‘two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court.’” (*Cypress Semiconductor Corp. v. Maxim Integrated Products, Inc.* (2015) 236 Cal.App.4th 243, 260 (*Cypress*).) A party appealing from an order denying attorneys’ fees “has an

‘uphill battle’ and must overcome both the ‘sufficiency of evidence’ rule and the ‘abuse of discretion’ rule. We need not repeat these well-settled rules.” (*FLIR Systems, Inc. v. Parrish* (2009) 174 Cal.App.4th 1270, 1275.)

2. *The Uniform Trade Secrets Act*

Under the Uniform Trade Secrets Act, a court may award reasonable attorneys’ fees to the prevailing party “[i]f a claim of misappropriation is made in bad faith” (Civ. Code, § 3426.4.) “Bad faith” requires both that the claim be objectively specious, and the plaintiff acted in subjective bad faith in bringing or maintaining the claim. (*SASCO v. Rosendin Electric, Inc.* (2012) 207 Cal.App.4th 837, 845 (*SASCO*)). “Subjective bad faith under section 3426.4 means the action was commenced or continued for an improper purpose, such as harassment, delay, or to thwart competition.” (*Id.* at p. 847.) The award of attorneys’ fees under this statute constitutes a sanction, and the trial court has broad discretion in deciding whether or not to award fees. (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95 Cal.App.4th 1249, 1262.)

3. *The Trial Court’s Ruling*

The court found that “while a colorable argument can be made that the action was objectively specious, the action was not brought or maintained in bad faith.” The ITC defendants argue the court applied the wrong legal standard in addressing the bad faith question, looking to whether Lyampert subjectively believed the QuickBooks file could be used to obtain a competitive advantage for ITC, rather than whether Lyampert brought the action for an improper purpose. The court’s statement of decision shows otherwise.

First, the statement of decision cited *SASCO, supra*, 207 Cal.App.4th at p. 847, and quoted from it the correct standard with regard to bad faith. Second, the court found Lyampert “genuinely believed that the QuickBooks file contained trade secret information that could be used to obtain a competitive advantage for the new company.” Lyampert knew Frenkel had taken a copy of the QuickBooks file, and he suspected the codefendants were using confidential QuickBooks data at ITC. Lyampert’s suspicions regarding confidential information were reinforced by Frenkel’s dishonesty and his attempts to hide his involvement in organizing and financing ITC. Lyampert’s suspicions were further reinforced “when he attempted to obtain e-mails that could have been sent to LA Micro customers, and was met with a claim that any such e-mails had been destroyed.” Indeed, Lyampert had evidence of one e-mail which suggested that a former LA Micro and current ITC employee “was using historical sales data from LA Micro to call on clients of LA Micro.” Based on these findings, the court held a “reasonable inference can be drawn that the purpose of the trade secret claim was to protect LA Micro’s interests in trade secret data, and not to shut down” ITC. This record amply supports the conclusion that the court applied the correct legal standard, and that Lyampert pursued his claim not for an improper purpose such as harassment, delay, or to thwart competition but “for the proper purpose of vindicating a legal right honestly believed to have been infringed.” (*Cypress, supra*, 236 Cal.App.4th at p. 267.)¹⁰

¹⁰ The ITC defendants also argue the trial court erred in excluding certain testimony from Lyampert when considering the attorneys’ fee claim. They acknowledge this is not an

F. Frenkel’s Requests Regarding LAMUK Are Denied

1. *Exceptional Circumstances Do Not Justify Taking Evidence and Making Findings in this Appellate Proceeding*

After the trial court entered judgment and before this appeal was fully briefed, a court in the United Kingdom issued an “approved judgment” in a case brought by Frenkel against Lyampert and others concerning the ownership of LAMUK. Frenkel asks us to judicially notice this judgment and otherwise take evidence regarding it, to make findings pursuant to Code of Civil Procedure section 909 and California Rules of Court rule 8.252, and to modify the judgment in this case based on whatever findings we make. We decline this invitation. Although the Code of Civil Procedure and the California Rules of court authorize appellate courts to make findings of fact, “ ‘the authority should be exercised sparingly. [Citation.] Absent exceptional circumstances, no such findings should be made.’ ” (*In Re Zeth S.* (2003) 31 Cal.4th 396, 405, italics omitted.)

No exceptional circumstances exist here. “The basic teaching of the Supreme Court is that [Code of Civil Procedure section 909] did not affect the respective provinces of the trial and reviewing courts, nor change the established rule against appellate weighing of evidence. The power to invoke the statute should be exercised sparingly, ordinarily only in order to affirm

independent ground for reversal, and instead suggest we provide guidance to the trial court on any remand to consider this evidence. As we affirm the denial of the attorneys’ fee request, this request is moot.

the lower court decision and terminate the litigation, and in very rare cases where the record or new evidence compels a reversal with directions to enter judgment for the appellant.” (*Monsan Homes, Inc. v. Pogrebneak* (1989) 210 Cal.App.3d 826, 830.) Neither of these circumstances apply here, and the requested enforcement of the United Kingdom judgment is accordingly not a matter for this court to resolve in the first instance.¹¹

2. *The Trial Court Did Not Abuse its Discretion in Denying Leave to Amend*

As a fallback, Frenkel argues the trial court abused its discretion in denying him leave to amend to add allegations concerning LAMUK, and that we should therefore remand this case for further proceedings related to LAMUK. Before trial, Frenkel sought leave to add an allegation to his breach of fiduciary duty claim asserting Lyampert breached that duty by excluding Frenkel from his interest in LAMUK, to add an allegation to his constructive trust claim that Lyampert was an “involuntary trustee” holding LAMUK in constructive trust, and to add a new cause of action for declaratory relief seeking a judicial determination of Frenkel’s rights in LAMUK. We find no abuse of discretion, and no need for remand.

(a) *Standard of Review*

California courts have a policy of liberally allowing amendments, where permitting the amendment does not prejudice the substantial rights of others. (*Board of Trustees v. Superior Court* (2007) 149 Cal.App.4th 1154, 1163.) The decision

¹¹ We also deny LAM and Lyampert’s motion for sanctions related to Frenkel’s requests regarding the United Kingdom judgment.

whether to permit a party to amend a pleading is reviewed for abuse of discretion. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) “An appellate court will not interfere with the denial of a motion to amend unless an abuse of discretion is manifest.” (*American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 880.)

(b) *The Trial Court Did Not Abuse its
Discretion in Denying Leave to Amend
Based on Prejudice to Lyampert*

Frenkel arguably knew of facts underlying the proposed LAMUK causes of action when he filed his original complaint in March 2010, but he did not move for leave to amend until August 2011.¹² Regardless of the delay in seeking amendment, a court should grant leave to amend unless that delay has misled or prejudiced a party. (*Higgins v. Del Faro* (1981) 123 Cal.App.3d 558, 564–565.) In denying leave to amend, the court found such prejudice. In particular, the matter was originally filed in March 2010 and, at the time of the September 2, 2011 hearing on the motion for leave to amend, was scheduled to begin trial December 7, 2011. Permitting amendment when trial was set to commence

¹² The court found Frenkel had not satisfactorily explained when he discovered the facts giving rise to the amended complaint, and why the request for amendment was not made earlier. We therefore assume Frenkel was aware of at least some facts regarding LAMUK at the time he filed his original complaint. Lyampert, however, was also aware of LAMUK’s existence, and had notice of disputes regarding it as early as April 6, 2011, when Frenkel’s counsel emailed Lyampert’s counsel asking for a stipulation to file a proposed first amended complaint.

in just three months would have prejudiced Lyampert by depriving him of the ability to challenge the proposed new cause of action by way of demurrer and summary judgment, and to move to strike the additional allegations based on an alleged failure to add necessary parties.¹³

In any event, without deciding the issue, it appears the proposed amendments are now moot. Following denial of his motion, the issue as to which Frenkel sought leave to amend—determination of LAMUK’s ownership—was litigated in the United Kingdom as between Frenkel, Lyampert, and others, and a judgment was issued. To the extent Frenkel seeks to enforce that judgment in the United States, or otherwise further litigate his alleged entitlement to an interest in LAMUK based on that judgment, those are new claims that were not the subject of the motion for leave to amend and need to be pursued in a new action.

G. The Trial Court’s Decision Not to Award Punitive Damages is Affirmed

Frenkel asks that, in the event of a remand, we instruct “the trial court [to] include the grounds for its ruling on punitive damages in any further statement of decision and, if warranted, reconsider the issue of punitive damages, including whether they should be awarded.” We find nothing necessitating remand, and in any event further proceedings with regard to punitive damages

¹³ While trial did not in fact commence until November 2014 for a variety of reasons, including implementation of the parties’ stipulation to the Neutral Accountant procedure, we judge the court’s exercise of discretion based on the facts then known to it, not based on later developments of which it had no knowledge at the time the motion for leave to amend was denied.

are unnecessary. It is the decision of the trial court and not the reasons for that decision that determine whether we should affirm. (*Constance B. v. State of California* (1986) 178 Cal.App.3d 200, 211.) The court's statement of decision provides a detailed overview of the evidence and the court's findings about the conduct of all participants, and substantial evidence in the record supports the court's determination that Lyampert's conduct, viewed in context with all the other evidence including Frenkel's own misappropriation of funds and lack of credibility at trial, did not warrant an award of punitive damages on the claims before it.

DISPOSITION

The judgment is affirmed. The parties are to bear their respective costs on appeal.

NOT TO BE PUBLISHED

WEINGART, J.*

We concur:

CHANEY, Acting P. J.

BENDIX, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6, of the California Constitution.